No. 406.

Reply Brf. of Blair, Baker & Lovett for P. E.

Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed Jan. 27, 1898.

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THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY, FREDERIC P. OLCOTT, ET AL., PLAINTIFFS IN ERROR,

vs.

THE STATE OF TEXAS.

Reply of Plaintiffs in Error to Supplemental Brief of Defendants in Error.

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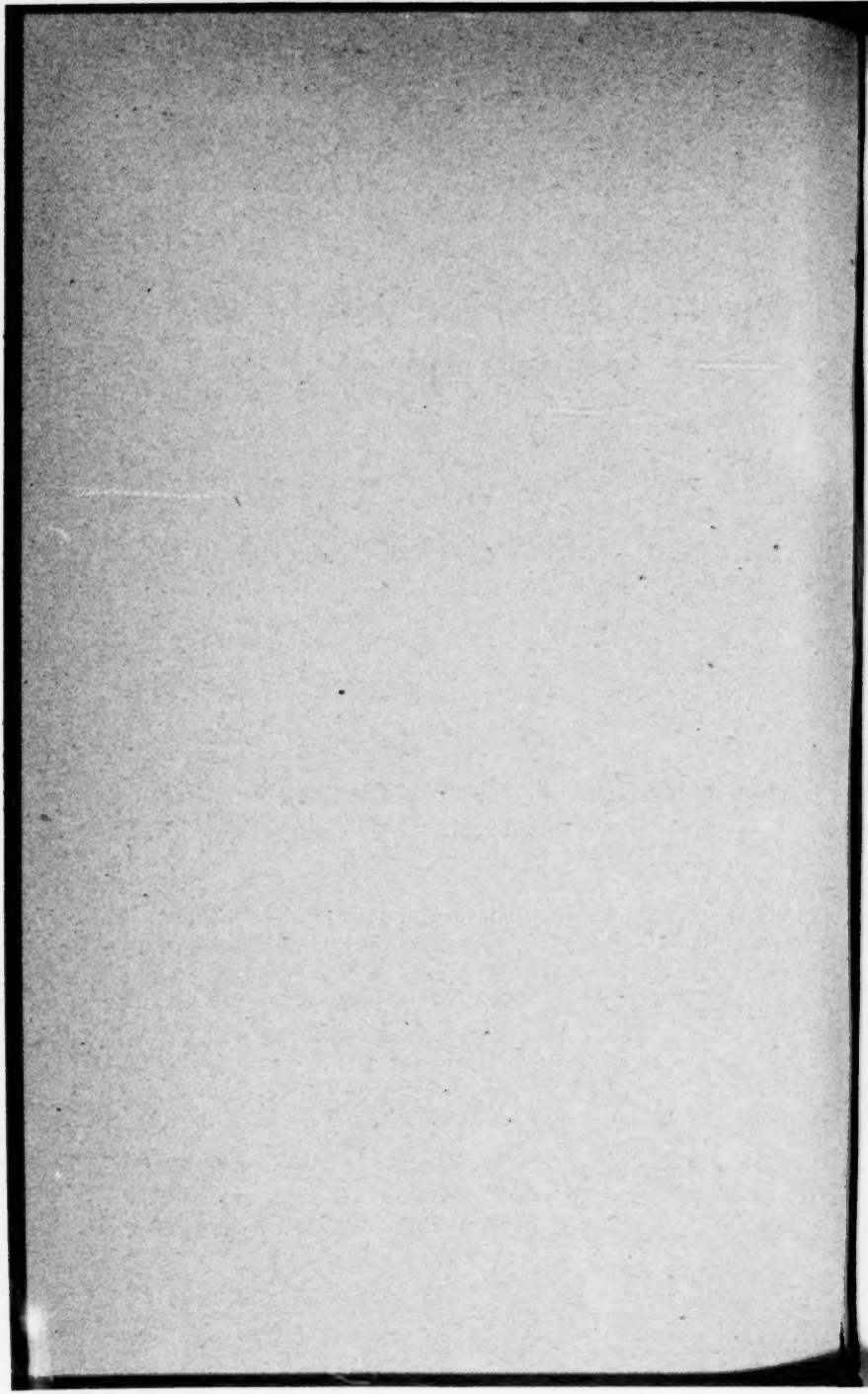

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Reply of Plaintiffs in Error to Supplemental Brief of Defendants in Error.

Since the conclusion of the oral argument of this cause counsel for defendant in error, by leave of court, has filed a supplemental brief purporting to be a reply to the brief filed in behalf of plaintiffs in error some ten days before the case was called. With leave of the court, we submit the following hastily prepared reply.

I.

We understand counsel for defendant in error first to contend that the Houston and Texas Central Railway Company was not entitled to the grant of sixteen sections of land per

mile made by the act of January 30, 1854, for its *branch line to Austin*, because that act provided that railway companies theretofore entitled to a grant of eight sections per mile, as this company was, should not receive the grant of sixteen sections per mile made by that act for any branch road. This is a proposition which we have never controverted. In our original brief (page 64) we conceded that this company could not claim by virtue of the general act of January 30, 1854, *alone and unaided by subsequent legislation*, the grant made by that act for anything except its main line. What we claim under the general act of 1854, standing alone, is that it granted sixteen sections per mile for the *main line*, extending from Buffalo bayou, at Houston, to the Red river, on the northern border of the State, and this right has not been disputed by the State. We do not claim a grant for the Austin branch by virtue of that act alone, because, as pointed out in our original brief, section 12 of the general act of January 30, 1854 (Appendix to Brief, page XXVIII), expressly provided that any company theretofore entitled to a grant of eight sections per mile should not be entitled to the grant made by that act for any *branch* road.

But we have contended that the special act of January 23, 1856 (Appendix to Original Brief, pages XXXI–XXXV) removed the restriction contained in section 12 of the general act of 1854 with respect to branch lines, so far as this company is concerned, and extended the benefit of the general act to this company for its Austin branch. Our reasons for this contention are set forth in our original brief (pages 64–70) and we refer to the argument there presented without repetition here.

But, as pointed out in our original brief (pages 70–74), we are by no means dependent either upon the general act of January 30, 1854, or the special act of January 23, 1856, for the grant to the Austin line, because whatever doubt existed with respect to our right thereto under those acts was un-

questionably removed by the special act of September 21, 1866 (Appendix, Original Brief, pages LVIII–LXI). Even leaving out of view the general act of January 30, 1854, and the special act of January 23, 1856, expressly extending, as we claim, the benefits of that act to this company for the Austin branch, still, as we shall presently show, we have an unmistakable right to the grant for the Austin branch under the act of September 21, 1866.

II.

It is next insisted by counsel for defendant in error that the State reserved the right to repeal the land grants made in 1854. In support of this contention he refers to section 6 of the special act of January 23, 1856 (Original Brief, Appendix, page XXXV), which reads as follows:

"That nothing in this act shall be so construed as to affect the right of the State to repeal or modify the act of January 30, 1854, entitled 'An act to encourage the construction of railroads in Texas by donations of land,' *provided* that the rights to lands acquired before such repeal or modification shall in all cases be protected."

It is to be observed that the right here reserved was merely to repeal the *general act of January* 30, 1854. He also relies upon the last clause of section 2 of the special act of February 4, 1858 (Original Brief, Appendix, p. L), which reads as follows:

"*Provided*, That the benefits of the provisions of any *general* law shall only inure to the said railroad company whilst said laws shall remain in force."

The first reservation of the right thus made to repeal (section 6 of the act of January 23, 1856) was expressly limited to the general act of January 30, 1854. The second and only remaining reservation was the provision in section 2 of the act of February 4, 1858, to the effect that the grant

made by any *general* law should continue only so long as the general law remained in force. Thus it is apparent that the right reserved by the State to repeal extended only to the general law of 1854. The provisions above quoted leave no doubt about this. It is scarcely worth while, however, to discuss at length this question, since we are not at all dependent upon the act of 1854 or any other general law for the grant in question, as we have it, beyond any sort of controversy, by the special act of September 21, 1866.

So let us concede now for the sake of argument that we are mistaken in our contention that the act of January 23, 1856, extended to the Austin line of this company the grant made by the general act of January 30, 1854, and concede further, for the same purpose, that if such grant was made it was nevertheless subject to the right of the State to repeal the laws making the grant; and then, proceeding upon the assumption that we are therefore without any right under the legislation of 1854 or 1856, let us now examine the rights of the company under the act of September 21, 1866. Section I of that act (Original Brief, Appendix, pages LVIII-LX), so far as material to the present inquiry, is as follows:

"That the Houston and Texas Central Railway Company shall be entitled to receive from the State a grant of sixteen sections of land of six hundred and forty acres each for *every* mile of road *it has constructed, or may construct and put in running order in accordance with the provisions of the charter of said railroad company,*" etc.

Here we have in the broadest terms a grant for *every* mile of the road which the company *has* constructed or *may* construct, without any restrictions or limitations whatsoever with respect to the lines to be thus aided and encouraged, but expressly applying to *all* the lines which the company might construct *in accordance with the provisions of the charter of the company.* It would be difficult to suggest

language more appropriate in legislative enactments to express the intention of the legislature to thus aid and encourage all the lines which this company was authorized to construct, including the Austin branch as well as the main line. The grant applied unmistakably to *all* lines which the company should construct *in accordance with the provisions of its charter.* The lines specified in the company's charter included by express designation the branch line to the city of Austin, as provided in the special act of February 7, 1853, amending and supplementing the charter of the company (Original Brief, Appendix, pages XVIII, XIX). The right to construct the Austin line was thus specifically conferred upon the company by the special act of February 7, 1853, although by section 2 of the original act of incorporation (Appendix, pages 1, 2) the company had general branching privileges. It was required to yield these general branching privileges by section 5 of the act of January 23, 1856 (Original Brief, Appendix, pages XXXIX-XXXV), except such as were "expressly granted by the provisions of its charter to *certain points.*" Therefore Austin was the only "certain point" designated with reference to branch lines, and that designation was made by the act of February 7, 1853, and was expressly excepted in the relinquishment of the right to construct branches required by section 5 of the act of January 23, 1856. So it appears, we submit, beyond reasonable controversy that the Austin branch was one of the lines covered by the company's charter when the act of September 21, 1866, was passed, and that it was undoubtedly the purpose of that act to make the grant for *all* lines which the company was authorized to construct, and therefore extended to the Austin line. This is a proposition so plain from the terms of the act that it does not seem to admit of extended discussion.

It is said, however, by counsel for defendant in error, in his supplemental brief, that the act of February 7, 1853,

designating the Austin line, was never accepted by the company. We are entirely at a loss to understand where he gets the authority for that statement. That the Austin line was constructed and is in operation today is a fact that admits of no question. It was, we submit, as effectually accepted as any other act relating to this company. Counsel in his supplemental bill says that the company did accept the act of January 23, 1856, which, among other things, contains the provision reserving the right to repeal the act of January 30, 1854. Now, there is no more evidence of the acceptance of that act than of the acceptance of the act of February 7, 1853. It seems, therefore, that the act containing a provision which he conceives to be beneficial to his side of the case he assumes and states was accepted, while another act, benefiting our side of the case, he assumes and says was not accepted. All of these acts, as will be seen by reference to their titles as well as to the subject-matter, were in the form of amendments to the charter of the company and related to the particular lines of road which the company actually constructed and which are in operation today, and never until the filing of the supplemental brief today has it been contended or even suggested that any of them were not accepted and acted upon by the company. They were amendments to the charter and as much a part thereof as if originally incorporated therein.

So we submit that even if it be true that the State had the right to repeal the grant made by the laws of 1854 and 1856, by virtue of the right reserved in the acts of January, 1856, and February, 1858, yet unquestionably the lands now claimed were granted by the act of September 21, 1866, which contained no provision reserving to the State the right to repeal the same. The lines which this company were authorized to construct were greatly needed. The main line from tide water on Buffalo bayou, in the southern part of the State, to the Red river, on the northern border,

penetrating the heart of the State, was much to be desired. The Austin branch, reaching the capital of the State, then wholly without any line of railway, was a great necessity. It is evident that the act of September 21, 1866, was intended to secure the construction of these lines by making certain the grant of 16 sections per mile to this company. Probably there was then some doubt respecting the right of the company under the prior act for the grant to the Austin line. Then, too, the right to repeal that law had been reserved, as we have seen above. In these circumstances the legislature, in order to remove all doubt respecting the right of this company to the land grant and to insure the construction of these lines, passed the special act of September 21, 1866, which expressly conferred upon it the grant of sixteen sections per mile for each line it should construct *in accordance with its charter*, whatever might be the fate of the general land-grant act or whatever might be the policy of the State in future with respect to other companies. This act, omitting as it did all provisions reserving the right to repeal, removed the danger to which the company was then subject from a possible repeal of the general laws in exercise of the right reserved in the acts of 1856 and 1858. This, no doubt, was one of the controlling objects for passing this law. Then, again, it put at rest all doubt as to the right of the company for lands for the construction of its Austin line—a right which might have been disputed, but, as we think, with but little reason—under the act of January 24, 1856. It also removed the danger of the expiration of the existing laws by their own terms in 1868, thereby cutting off the right to earn the lands unless the company should complete its lines before 1868, which was impossible on account of the condition of the State as a result of the war. That these were the objects of the special act of September 21, 1866, seems to be too plain for extended discussion.

III.

In our original brief (page 71) we said that it had never been denied by the State or any of its officers that the special act of September 21, 1866, granted lands for the construction of the Austin line, as well as the main line of the company. The most that was ever claimed by the State with respect to that act was that the road was not constructed as expeditiously as that act required, and the district judge trying this case so held. This holding, however, was not sustained by the court of civil appeals or by the State supreme court, for the very obvious reason that the *fact* of construction had been determined by the executive department of the State, which was entrusted by law with exclusive jurisdiction to ascertain and determine such fact. Counsel for defendant in error in his supplemental brief, as well as in his oral argument, for the first time in behalf of the State denied that the act of September 21, 1866, granted lands for the construction of the Austin line. His contention now is, as we understand it, that the act granted lands only for the main line. This contention is based upon the last clause of section 3 (Original Brief, Appendix, pages LX, LXI), which is in these words:

"And said railroad company shall construct their road in the line heretofore prescribed by 'An act for the relief of the Houston and Texas Central Railway Company,' approved February 8, 1861."

Turning to the act of February 8, 1861 (Original Brief, Appendix page LI), we find the line there defined to be as follows:

"*Provided* said railroad shall run on the nearest and most practicable route from its line at or near Horn Hill to Dresden, in Navarro county, and thence to the town of Dallas, or within one and a half miles of said town, and thence to the terminus of Red river, within fifteen miles of Preston."

From this it is argued that the line to be benefited by the grant made by the act of September 21, 1866, was the line thus defined and that line only. This contention scarcely deserves serious consideration. If such was the object of the act of September 21, 1866, then that act was altogether useless and the legislature did an idle thing in passing it. *This company already had a grant of sixteen sections per mile for the line thus referred to, viz., its main line.* As already stated, the grant made by the general act of January 30, 1854, extended to this company, beyond any sort of controversy, for its main line, unaided by any other legislation, but did not extend to the branch line unless so extended by subsequent laws. It has never been denied by the State that the company was entitled to the grant for its *main line* under the general act of 1854, and as a matter of fact it received sixteen sections per mile for each mile of its main line, and they are not in dispute. Having this right, then, under the act of 1854, beyond dispute or room for controversy, what could have been the necessity or reason for passing a special act in 1866 to give it a right which it already enjoyed?

The object of the requirement in section 3 of the act of September 21, 1866, that the company should follow the line defined by the act of February 8, 1861, was to compel the company to construct its line to Dresden and through or near the then growing city of Dallas, and to the vicinity of Preston, on the Red river, rather than at Coffee Station, as provided in section 2 of the original act of incorporation. It simply defined and fixed the route of the *main line*, which otherwise might be uncertain, and prevented the company from varying its line as it saw proper. The legislature intended that the line should go via Dresden, in Navarro county, and via the town of Dallas. There was no occasion to deal further in that act with the route of the Austin branch. That line was already provided for by the act of February 7, 1853, and the only object sought with regard thereto was the construction of the line to the capital of the State. All

the provisions of the act of September 21, 1866, go to show unmistakably that it was a special and independent grant to this company for its Austin branch as well as its main line, and was intended to remove all doubt respecting the right under existing laws and secure the construction of these lines independently of general laws or a change of general policy.

IV.

It is further contended that the Austin branch was constructed under the authority of the act of August 15, 1870, though it is admitted by counsel for defendant in error (Supplemental Brief, page 3) "that it is wholly immaterial whether the road in question was constructed by authority of the act of 1853 or of 1870." The State supreme court in its opinion refusing a writ of error did say, in effect, that the line was constructed under the act of 1870, but did not deny that the right existed under prior laws. There is nothing in the record to justify any such conclusion. The acts speak for themselves, and in our original brief we show that this company acquired the right to build the Austin line as early as February 7, 1853 (Appendix, Original Brief, pages XVIII, XIX), and retained it throughout as a part of its charter rights and obligations, and there is certainly nothing in the record to show that the line was not built under the power thus existing (Original Brief, pages 66, 67). This view of the State supreme court is one of the errors to our prejudice, since thereby it was in effect held that we had no contract to be impaired. The views of the State supreme court upon this question are not at all binding on this court (Original Brief, pages 58–61), and indeed have no place in the record in this cause, as we have shown in our Original Brief, pages 48–57.

V.

Defendant in error's supplemental brief seems to regard and treat our claim as resting in some way on a grant or supposed grant of lands in the charter of the Washington County Railroad Company. Such is not the case. We do not claim this grant by authority of the charter of that company. Neither do we claim nor have we ever received any lands for the 25 miles of our Austin branch, which was constructed by and purchased from the Washington County Railroad Company. By permitting us to purchase that line and make it a part of our Austin branch the State saved the land, aggregating over two hundred and fifty thousand acres, which this company would have earned by constructing the whole of its Austin branch, paralleling the Washington County road for its length, covering a distance of 25 miles of the route. What we do claim is that we purchased, with the consent of the State, the Washington County road, extending from a junction with our main line at Hempstead, in the direction of Austin, for 25 miles to Brenham, and that by then extending it from Brenham to Austin, a distance of over 95 miles, thereby completing the entire Austin branch, we earned the land in controversy, for which certificates were issued to us and which were located upon these lands against that part of the line from Brenham to Austin.

VI.

Counsel for defendant in error in his supplemental brief (pages 10, 11) says that we insist that the ordinance of 1868, passed by the constitutional convention, ratifying the purchase of the Washington County road, was validated by the legislature by the act of August 15, 1870. We certainly hope that it is unnecessary for us to deny that we ever took

any such position. How counsel could have gotten the impression that we contended, as he says we did, that the legislature could itself amend the constitution, we are unable to imagine. What we claimed was, and what we now claim is, that even if the ordinance was void, and therefore ineffectual to validate the purchase of the Washington County railroad, yet the legislature by the act of 1870 did validate such *purchase*, and thereby removed all question in regard thereto. Upon this point we beg to refer, without repetition, to the argument in our Original Brief, pages 139–162.

VII.

Recurring again to the special act of September 21, 1866, counsel for defendant in error in his supplemental brief (pages 9, 10) confesses that there has just occurred to him a view of that act not before suggested. This new view seems to depend in some way upon the general act of November 13, 1866, which he reads in connection with the special act of September 21, 1866. It seems to be sufficient to say that the special act is complete of itself, is entirely clear in its meaning, and does not require the aid of any other act in its construction. He points out that the general act of November 13, 1866 (which this court held in *Davis vs. Grey*, 16 Wall., 203, continued in force for ten years from its date, the general act of January 30, 1854), departed from the general act of 1854 in this respect. The act of 1854 excluded branch lines from the aid thus given to railroads, while the general act of November 13, 1866, in the last clause of section 4 (Original Brief, Appendix, page LXII) provided "that all tap roads over 25 miles long shall be entitled to the benefits of this act." We confess that we are unable to gather from defendant's argument upon this point what benefit he expects to derive from this provision in the general act of November 13,

1866. If it is material at all, we submit that it indicates clearly the purpose of the legislature to grant lands for the construction of branch roads—thereby reversing the policy followed in enacting the general act of 1854. This certainly favors our contention (which, however, does not seem to need such support) that the special act of September 21, 1866, was intended to grant land for the Austin branch as well as for the main line.

VIII.

It is also contended by counsel for defendant in error that this company is not entitled to the lands in question, because it is claimed the certificates were located in what was then known as the Texas and Pacific reservation. Such claim was stated as one of the grounds of recovery in the original petition in the district court, but apparently was not urged. The district judge who tried the case declined to pass upon that question (Record, page 33). The court of civil appeals likewise found it unnecessary to determine the question (Record, page 96, 97). Neither was it considered by the State supreme court in the opinion refusing the writ of error (Record, page 185–187). We submit, therefore, that the question is not in the case. Moreover, it does not go to the right of the company to the land grant in question, nor to the validity of the certificates, but only concerns the *location* of the particular sixteen certificates directly involved in this suit. The decisions of the district judge and the opinion of the court of civil appeals, as well as of the supreme court, however, each and all deny the validity of the *certificates themselves*, and have the effect to invalidate the title of the company to the entire grant of over nine hundred and eighty thousand acres of land for the construction of that part of the Austin branch extending from Brenham to Austin,

when it is not claimed that all of the certificates, or, indeed, that any except these sixteen, were located in the Texas and Pacific reservation. We take it that this court will consider the grounds upon which the case was decided by the courts below and the issues as presented by the pleadings, so far as they present rights within the protection of the National Constitution, and will not inquire into issues not involving Federal questions when they were not passed upon by the State courts. The proposition that this point was not the basis for the judgment of the State courts is not a mere matter of inference or deduction, but appears expressly from the language of the courts themselves. We submit, therefore, that the question is wholly irrelevant.

We need not, however, rest the question here. The act reserving the land for the Texas and Pacific was not passed until May 2, 1873, while it is undisputed in the record that *this company's certificates were located July* 28, 1872 (Record, pages 65, 66). There can be no question, therefore, respecting the validity of the location as against the Texas and Pacific reservation. Upon this point see the fifth ground of the petition to the State supreme court for writ of error, as contained in the printed Record, page, 147, where the statutes and the Texas decisions bearing upon the point are cited.

The special act of the legislature of Texas making the reservation in favor of the Texas and Pacific Railway Company is not in the record. Counsel for defendant in error did not copy it in his brief, as required by the rules of this court, nor has he in any way brought the act before the court, or enabled this court to inspect the act so as to determine what, if any, reservation was made, when it was made, and the conditions upon which it was made. We insist, therefore, that the question sought to be presented with respect to this matter by counsel for defendant in error should be dismissed from consideration altogether.

IX.

We have endeavored to limit this argument to a reply, strictly, to the supplemental brief and argument of defendant in error, but in conclusion beg leave to call the attention of the court to the case of *Davis vs. Grey*, 16 Wall., 203 (so often cited in our original brief as controlling in this case), in connection with a point mentioned in the oral argument, but to which we failed to refer in our original brief. It is this: In that case this court recognized and gave effect to an act passed July 27, 1870, while the constitution of 1869 was in force, as an affirmation by the State of the right of the Memphis, El Paso and Pacific Railroad Company to the lands granted it under laws prior to 1869 (16 Wall., 223, 232). This is a direct authority to the effect that the act of August 15, 1870 (Original Brief, Appendix, pages LXVIII-LXXV), was effectual, notwithstanding the constitution of 1869, to waive any ground of forfeiture that might have then existed for default with respect to construction, and to ratify the purchase of the Washington County railroad, even though the ordinances of the convention which framed the constitution of 1869 should be held void. Such authority scarcely seems to be necessary, but nevertheless it exists in the case referred to.

Respectfully submitted.

J. P. Blair,
Jas. A. Baker,
R. L. Lovett,
Of Counsel for Plaintiffs in Error.